United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1426

IN THE

United States Court of Appeals

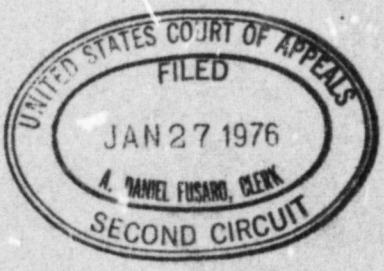
FOR THE SECOND CIRCUIT

IRVING STOLBERG
Plaintiff-Appellant

v.

MEMBERS OF THE BOARD OF TRUSTEES
FOR THE STATE COLLEGES
OF THE STATE OF CONNECTICUT, ET ALS
Defendants-Appellees
and
Respondents-Appellees

BRIEF OF DEFENDANTS-APPELLEES AND RESPONDENTS-APPELLEES



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Docket No. 75-7426

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Plaintiff-Appellant

v.

MEMBERS OF THE BOARD OF TRUSTEES
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Defendants-Appellees
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BRIEF OF DEFENDANTS-APPELLEES AND RESPONDENTS-APPELLEES

STATEMENT OF ISSUES

In a civil contempt proceeding brought to enforce compliance with an earlier judgment ordering that the plaintiff be offered reinstatement with tenure to a faculty position at the state college governed by the defendant Board of Trustees, and where the plaintiff was reinstated with tenure by the Board of Trustees but was soon thereafter found to be violating the dual job ban provision of the state constitution by the State Comptroller, not a party to the original action, who commenced withholding the plaintiff's bi-weekly pay checks:

1. Did the District Court err in denying the plaintiff's motion for a contempt judgment against the defendant Board of Trustees?

2. Did the District Court err in failing to hold that the respondent state officials, not parties to the original action, were precluded from invoking against the plaintiff the dual job ban (Art. III, Sec. 11, Constitution of Connecticut and Sec. 2-5, Conn. Gen. Stat., as amended) which was not raised at the trial preceding the original judgment and which was not essential to the earlier decision?

3. Did the District Court's clarification of its earlier judgment undermine any rights and obligations established thereunder?

4. Did the District Court err in not finding that the actions of certain respondents were in bad faith which supported the relief sought?

5. Did the District Court err in denying plaintiff's motion for immediate and interim salary relief pending the disposition of the dual job ban issue?

STATEMENT OF THE CASE

On February 29, 1972, the United States District Court for the District of Connecticut filed a memorandum of decision in which it found that the plaintiff, Irving Stolberg, had been denied renewal of a teaching contract for the 1969-70 academic year and tenure at Southern Connecticut State College (S.C.S.C.) in retaliation for the exercise of his first amendment right of free speech, in violation of 42 U.S.C. § 1983. In a judgment issued on March 7, 1972, the Court ordered the defendant Board of Trustees of the State Colleges to "promptly offer to reinstate the plaintiff as a faculty member with tenure" at S.C.S.C. for the 1972-1973 academic year. Certain members of the Board of Trustees, plus its executive secretary and the former president of S.C.S.C., were ordered as individuals to pay the plaintiff $9,000.00 in compensatory damages. The plaintiff appealed to this Court, challenging the sufficiency of

the relief granted in his favor and seeking additional compensatory damages, exemplary damages, and attorneys' fees. This Court affirmed, except as to the denial of attorneys' fees. *Stolberg* v. *Members of the Board of Trustees for the State Colleges of the State of Connecticut*, 477 F.2d 485 (2d Cir. 1973).

After a two-year delay for sundry reasons, the plaintiff resumed his teaching position at S.C.S.C. on August 28, 1974. (J.A. 106a-107a). At the time of this reinstatement, the plaintiff was and still is a State Representative in the General Assembly. He had been first elected to the state legislature in 1970 after his 1969 termination at S.C.S.C. He was subsequently re-elected to that body in 1972 and 1974.

In auditing the payrolls submitted to the State Comptroller for payment pursuant to § 2-90, Conn. Gen. Stat., as amended, the State Auditors discovered that the petitioner was in violation of Art. III, Sec. 11, Constitution of Connecticut, and Sec. 2-5, Conn. Gen. Stat., as amended, the so-called "dual-job ban", by holding a position in the executive branch of state government (at S.C.S.C.) during the term for which he had been elected to the General Assembly. On October 7, 1974, the State Auditors informed the respondent Governor of this illegal expenditure as required by § 2-90, as well as the Joint Committee on Legislative Management. (J.A. 45a, ¶ 8).

By letter dated October 8, 1974, to which was attached the aforesaid letter of the State Auditors, the Governor asked the chairman of the Board of Trustees what action the Board intended to take to settle this matter. (J.A. 46a, ¶ 10). On October 17, 1974, the chairman of the Board of Trustees indicated that due to the plaintiff's reinstatement by court order "the Trustees believe it would be inappropriate for them to raise any questions with Mr. Stolberg concerning his position on the faculty." (J.A. 63a-64a).

Meanwhile, this controversy came to the attention of the chief administrative officer of the State Comptroller's office, respondent Nicholas Wayne, who consulted with Deputy Comptroller William Diana about whether the plaintiff's teaching salary at S.C.S.C. could be legally paid by virtue of the dual job ban. A letter dated October 15, 1974 seeking formal advice of the Attorney General was drafted by respondent Wayne and submitted to the respondent State Comptroller who approved and signed same. (J.A. 65a). The State Comptroller also sent a letter to the Board of Trustees seeking its position. (J.A. 17a). By formal letter of advice dated October 28, 1974 and delivered on October 31, 1974, the Attorney General opined that the petitioner was in violation of the dual job ban. (J.A. 65a-72a). This advice was based upon a 1971 opinion to the president of another state college regarding a state senator who was teaching a course at the state college. (J.A. 100a-103a). The formal advice which was drafted by respondent Sidney D. Giber was approved in ascending order by Assistant Attorney General F. Michael Ahern, respondent Giber's superior; Executive Assistant Attorney General Michael J. Scanlon; Deputy Attorney General C. Perrie Phillips; and respondent Robert K. Killian, the Attorney General. (J.A. 97a).

The State Comptroller's aforesaid letter of October 15, 1974, to the Board of Trustees was replied to by James A. Frost, Executive Secretary of the Board of Trustees, by transmitting a copy of the chairman's aforesaid letter of October 17, 1974 to the Governor. (J.A. 97a-98a). Subsequently, the Board of Trustees met in executive session on November 1, 1974, and agreed to take no action against the plaintiff (J.A. 98a).

Meanwhile, on the basis of the Attorney General's formal letter of advice, the State Comptroller commenced withholding the plaintiff's bi-weekly S.C.S.C. pay checks for the pay period commencing on November 6, 1974 and to date has continued to

withhold same. The plaintiff was advised of this withholding by the college president on November 21, 1974, the day before the first pay check was withheld. (J.A. 98a). In the interim, the Board of Trustees, through its personnel at S.C.S.C., has continued to date to submit to the State Comptroller the plaintiff's name on each succeeding college payroll for payment. (J.A. 98a).

In order to force the payment of his salary, the plaintiff herein sought a contempt judgment against not only the defendants in the original action, i.e., the Board of Trustees, but also against the former Governor, the former State Comptroller, the Comptroller's Chief Administrative Officer, the Payroll Officer, the State Auditors and the former Attorney General and Assistant Attorney General who authored the aforementioned letter of advice. The plaintiff also sought an interim order requiring that salary payments be made.

On June 23, 1975, the District Court entered its Memorandum of Decision denying all relief sought by order to show cause. Judgment was entered on June 25, 1975, and on June 27, 1975, the District Court also denied the interim relief sought.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN DENYING THE PLAINTIFF-APPELLANT'S MOTION FOR CONTEMPT JUDGMENT AGAINST THE DEFENDANT-APPELLEE MEMBERS OF THE BOARD OF TRUSTEES.

The defendant members of the Board of Trustees of the State Colleges have fully complied with the order of the District Court in this case regarding the plaintiff's reinstate-

ment to a teaching position with tenure at S.C.S.C. On August 28, 1974, the Board of Trustees reinstated the plaintiff in his teaching position with tenure and with seniority rights retroactive to 1969. (J.A. 107a, ¶ 22). As the plaintiff stated in his affidavit annexed to his Motion for Interim Order dated May 17, 1975:

> "The Board of Trustees, and the College continue to expect me to fulfill my duties as Assistant Professor at the college, which I do." (J.A. 114a, ¶ 4).

This has consistently been the position of the defendant Board of Trustees. The Board has included the plaintiff's name on every payroll to date and has left the question of the plaintiff's holding a position at Southern Connecticut State College in violation of Art. III, Sec. 11, Constitution of Connecticut and § 2-5 of the Connecticut General Statutes, as amended, to other state officials. (J.A. 63a-64a).

The defendant Board members can hardly be in contempt of court. It is well established that inability to comply with a court order is a complete defense to a contempt proceeding. *United States* v. *Bryan*, 339 U.S. 323, 330, 70 S.Ct. 724, 730 (1950); see also *Federal Trade Commission* v. *Blaine*, 308 F.Supp. 932 (D.C. Ga. 1970). Nor will a court hold a party in contempt if compliance involves hardship or oppression; the court must review each case on its facts and make a "common sense estimate of fairness." *United States* v. *Fleischman*, 339 U.S. 349, 361-362, 70 S.Ct. 739, 745-746 (1950). While the Board of Trustees has complied with the District Court's judgment, it has no authority to issue paychecks, and this is, in effect, what the plaintiff is seeking from the Trustees by petitioning the District Court to issue a contempt citation against them. It is clear that the Board has not created its inability to issue pay checks. See *United States* v. *Swingline, Inc.*, 371 F.Supp. 37 (D.C. N.Y. 1974). As the plaintiff has admitted (J.A. 51a, ¶ 19), the function to pay salaries belongs

to the State Comptroller under § 3-119, Conn. Gen. Stat., as amended, and one will not be held in contempt for failure to pay over certain monies if he does not have "possession or control over the money." *Blackwelder* v. *Collins*, 252 F.2d 854, 855 (C.A. D.C. 1958); see also *City of Fairview* v. *Norris*, 234 F.2d 199, 201 (6th Cir. 1956).

> "The law exposes to summary punishment only those who have already had their rights adjudicated in court. Consistent with these limitations, a court will only order a public official to perform or refrain from certain acts which are within the powers conferred upon him by law, Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963), and will deny relief when those parties before it are not fully empowered under state law to take the action requested, Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963)." *Wright* v. *County School Board of Greensville Co. Va.*, 309 F.Supp. 671, 677 (E.D. Va. 1970), revd. on other grounds, 442 F.2d 570 (1971), aff'd. 407 U.S. 451, 92 S.Ct. 2196 (1972).

It is also significant that the plaintiff has neither claimed nor proven that the respondents, not parties to the original action, have in any way acted in concert with the defendants to allow the latter to circumvent the order. The record is devoid of even a scintilla of evidence to suggest the possibility of collusion between the defendants and the respondents to frustrate the judgment.

Absent any direct acts of contempt by the Board of Trustees or of collusion between the defendants and respondents, the plaintiff has attempted to impute to the Board of Trustees the Attorney General's rendering of advice to the State Comptroller on the dual job ban.

The plaintiff stresses that the respondent Assistant Attor-

ney General has represented all defendants and respondents, and he states that:

> "[W]e may further infer that the attorney general's common representation of defendants and respondents in this proceeding constitutes a ratification by the trustees of the acts of the attorney general in this matter." Plaintiff's Brief, p. 37.

Such an inference is not legitimate and the authority cited by the plaintiff does not support this proposition. In the case of *In Re Lacivita*, 255 F.2d 365 (3rd Cir. 1958), for example, the Court of Appeals reasoned:

> "It is enough to say that Simmon's argument that his counsel was not authorized to waive the conditions in question is completely without merit when it is recalled that he was present in court when the statement was made on his behalf by his counsel and he did not object to it. His silence *under these circumstances* was clearly a ratification of his counsel's representation even if the latter had no previous authority to make it." *Supra* at 467. (Emphasis added).

The facts in the present case differ vastly from those in *In Re Lacivita*, *supra*, upon which the plaintiff relies. By statute the State Comptroller is a "client" of the Attorney General as is the Board of Trustees. Sec. 3-125, Conn. Gen. Stat., as amended. When the respondent Assistant Attorney General rendered a formal letter of advice to the State Comptroller, who requested advice on the applicability of the dual job ban provision of the State's Constitution to the plaintiff, he was not acting as the attorney of the Board of Trustees. The Assistant Attorney General was merely advising a state official who was not even a party to the main suit.

II.

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE RESPONDENTS-APPELLEES WERE NOT PRECLUDED FROM RAISING THE DUAL JOB BAN ISSUE.

A. Respondents-Appellees are not agents, servants, or employees of the defendants; they are not in privity with them; nor have they acted in collusion with them.

Without evidence of any actions by the defendant members of the Board of Trustees which would warrant a contempt judgment against them, the plaintiff claims that the respondents, not parties to the original action, are either in privity with the Board or are somehow subject to their control, and are, therefore, bound by the prior judgment as to any issues which could have been litigated in the action which led to the reinstatement of the plaintiff to a teaching position at Southern Connecticut State College.

> "Under federal practice an injunction may not issue against and bind all the world. The persons whose conduct is governable by court order are defined by rule: 'Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise' Fed Rules Civ. Proc. Rule 65d, 280 § C.' This rule fixes the scope of valid orders and terms in a decree exceeding the rule are of no effect. [Citations omitted]. In general, only those acting in concert with, or aiding or abetting, a party can be held in contempt for violating a court order. One whose interest is independent of that of a party and who is not availed of as a mere device for circumventing a decree is not subject to such sanctions.

> United Pharmacal Corp. v. United States, 306 F.2d 515 (1st Cir. 1962)." *Wright* v. *County School Board of Greensville Co., Va.*, 309 F.Supp. 671, 677 (E.D. Va. 1970).

It is well established that to be liable for contempt, "a non-party respondent must either abet the defendant, or must be legally identified with him." *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 833 (2d Cir. 1930); see also *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 436-437, 54 S.Ct. 475, 477-478 (1934); *Backo* v. *Local 281, United Brotherhood of Carpenters and Joiners of America*, 438 F.2d 176, 180-181 (2d Cir. 1970); *Kean* v. *Hurley*, 179 F.2d 888, 890 (8th Cir. 1950).

> "A court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world no matter how broadly it words its decree." *Alemite Mfg. Corp.* v. *Staff*, *supra*, at 833.

None of the respondents, many of whom are or were elected or appointed officials of the State of Connecticut or employees of such officials, is in any way an *agent* or *employee* of the defendant Board of Trustees. Former Governor Meskill and former Attorney General Killian answered to the people of Connecticut who elected them, as did former State Comptroller Agostinelli. State Auditors Donohue and Becker answer to the General Assembly, § 2-90, Conn. Gen. Stat., as amended. Respondents Wayne and Brooks report to the State Comptroller; and respondent Giber answers to the Attorney General. See §§ 3-112, 3-125, Conn. Gen. Stat., as amended. No statute subordinates any respondent to the Board. See, e.g., § 10-109b, Conn. Gen. Stat., as amended, which sets forth the purview of the Board's powers.

The plaintiff erroneously contends that the defendants and respondents have conceded that in this case the issuance of salary checks is a ministerial duty which the plaintiff concludes "plainly" puts the State Comptroller within the ambit

of rule 65d. Plaintiff's Brief, pp. 24, 25, 36. This assertion is founded on the following statements included in the reply brief of the defendants and respondents filed in the District Court in opposition to the petition for a contempt judgment:

> "Certainly *if the plaintiff were not a member of the General Assembly* and had rendered the teaching service to his college the comptroller would have no choice but to pay him, i.e., he would be under a ministerial duty to pay under Sec. 3-119 . . ." (J.A. 110a). (Emphasis added).

The qualified nature of the above statement clearly refutes any suggestion that the defendants and respondents have conceded that the Comptroller has a ministerial duty to pay the plaintiff even though he continues to be in violation of State constitutional and statutory provisions. Instead, the State Comptroller has a duty not to make any unauthorized illegal payments. It is further submitted that even if the State Comptroller is somehow decreed to be an agent of the defendant Board of Trustees, there exists no law requiring an agent to execute an illegal command from his principal.

In addition to the State Comptroller, the only other respondent whom the plaintiff specifically attempts to link to the first judgment is the Assistant Attorney General. However, the Assistant Attorney General was not acting as the Board's attorney when he advised the Sate Comptroller — not the Board — on the dual job ban. The plaintiff's leading case, *Sawyer* v. *Dollar*, 190 F.2d 623 (D.C. Cir. 1951), does not support his position regarding the Attorney General. Plaintiff's Brief, p. 35. In *Sawyer*, the Solicitor General was adjudged in contempt for directly advising the Secretary of Commerce, a defendant in the main suit, to disobey the judgment. *Supra* at 634. Here the Attorney General was advising the Comptroller, a non-party to the main suit, on a request for advice initiated by that disinterested non-party.

Thus, the respondents are not somehow in privity with the Board members as the plaintiff contends, and it is well settled that a judgment will not bind strangers to the prior proceeding. *Keokuk & W. R. Co.* v. *Missouri*, 152 U.S. 301, 14 S.Ct. 592, 597 (1894); *Bruszewski* v. *United States*, 181 F.2d 419, 422 (3d Cir. 1950); *Green* v. *Brophy*, 71 App. D.C. 229, 110 F.2d 539, 541 (1940).

The mere coincidence of all defendants and respondents being office holders or employees of the State of Connecticut is insufficient to make the judgment binding upon the State and therefore upon each respondent as a state officer or employee — particularly with respect to the dual job ban issue which was not even litigated in the main action.

The main action was a suit under the Civil Rights Act of 1871. *Stolberg* v. *Members of the Board of Trustees of the State Colleges*, 474 F.2d 485 (2d Cir. 1973). The defendant Board members were sued both personally and in their official capacities for violating the plaintiff's constitutional rights. *Supra* at 486. The award of money damages ran against the defendant Board members personally. *Stolberg* v. *Members of the Board of Trustees*, Civil No. 13591, Memorandum of Decision, Findings of Fact and Conclusions of Law. (J.A. 37a). This is indeed a far cry from *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 60 S.Ct. 907 (1940) relied on by the plaintiff for the proposition that a judgment against a representative of the United States is determinative in relitigation of the same issue between the party invoking the doctrine and another governmental officer. Plaintiff's Brief, pp. 35-36. In *Sunshine*, the Supreme Court held that United States and its officers were bound by a prior judicial determination that *Sunshine's* coal was bituminous within the meaning of § 17 of the Bituminous Coal Act of 1937 (*Sunshine Anthracite Coal* v. *National Bituminous Coal Commission*, 105 F.2d 559 (8th Cir. (1939), cert. den. 308 U.S. 604, 60 S.Ct. 142 (1940) because

the National Bituminous Coal Commission was expressly authorized by statute to enter into litigation on the issue in question and represent the interests of the United States. *Supra* at 402-403, 60 S.Ct. at 916-917.

Quoting *Sunshine*, the Supreme Court has succinctly phrased the rule as follows:

> "Thus before we can find the Government collaterally estopped by the FCC licensing, we must find 'whether or not in the earlier litigation the representative of the United States had authority to represents its interests in a final adjudication of the issues in controversy.' Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403, 60 S.Ct. 907, 917, 84 L.Ed. 1263." *United States* v. *Radio Corporation of America*, 358 U.S. 338, 352, 79 S.Ct. 457, 468 (1959).

Further, in *Sunshine* the Supreme Court significantly observed that a suit against a tax collector would not be *res judicata* as to the United States because a

> "suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.' Sage v. United States, supra, 250 U.S. at p. 37, 39 S.Ct. at p. 416, 63 L.Ed. 820." *Sunshine Anthracite Coal Co.* v. *Adkins, supra*, at 403, 60 S.Ct. at 917.

Similarly in *Stone* v. *Interstate Gas Co.*, 103 F.2d 544 (5th Cir. 1939), aff'd. 308 U.S. 522, 60 S.Ct. 292, reh. den. 308 U.S. 639, 60 S.Ct. 381 (1940), the plaintiff had successfully obtained from a three judge court an injunction against collection of a tax by former state tax officials under a statute found unconsti-

tutional. In the second suit, it sought to bind present state officials by the former judgment. The Court refused, stating:

> "We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it. *This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him. The reference to him as Commissioner is descriptio personae.* Smietanka, Collector, v. Indiana Steel Co., 257 U.S. 1, 42 S.Ct. 1, 66 L.Ed. 99. *The three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them.* The State of Mississippi for whom they tried to act was not a party, though her Attorney General was among those sued. She could not under the Eleventh Amendment, U.S.C.A. Const. have been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their governments not be bound by the judgment, is fully explained in United States v. Lee, 106 U.S. 196, 222, 1 S.Ct. 240, 27 L.Ed. 171. See also Sage v. United States, 240 U.S. 33, 39 S.Ct. 415, 63 L.Ed. 828; Hussey v. Crane, 222 U.S. 88, 98, 32 S.Ct. 33, 56 L.Ed. 106; Carr v. United States, 98 U.S. 433, 25 L.Ed. 209; Stanley v. Schwalby, 162 U.S. 255, 16 S.Ct. 754, 40 L.Ed. 960. Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were now sued; and as she is not bound by the former judgment against her officers, he is not." *Supra* at 547. See also *Marshall* v. *Crotty*, 185 F.2d 622, 627-628 (1st Cir. 1950). (Emphasis added).

By the same token the judgment in *Stolberg* was personal in nature although the injunctive relief control[led] the official

duties of the defendant Board members. And so for present purposes those aforecited cases involving the personal liability of state officials are considerably more akin to the *Stolberg* action than is the federal regulatory case epitomized by *Sunshine*.

The plaintiff has also endeavored to buttress his privity claim, or vicarious liability theory, upon such cases as *Regal Knitwear* v. *N.L.R.B.*, 324 U.S. 9, 65 S.Ct. 478 (1945) and *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168, 94 S.Ct. 414 (1973). Plaintiff's Brief, p. 35. These decisions were appeals from orders of the National Labor Relations Board in "back pay specification" proceedings; they dealt with the question of whether such N.L.R.B. orders were enforceable against bona fide successor corporations. In *Golden State Bottling*, the Supreme Court held these orders enforceable against bona fide successors due to the "broad remedial powers . . . to frame such remedial orders . . . as were necessary to further the public interest subserved by the [National Labor Relations] Act." *Supra* at 176, 94 S.Ct. at 421. Notwithstanding the fact that these cases involved orders by a governmental agency against a private corporation which is hardly congruent with the instant situation, it is further stressed that the respondents herein are neither the defendants' successors as members of the Board of Trustees nor employees of that Board; they are independent state officials and their subordinates.

> "Our holding in no way contravenes the policy underlying Rule 65(d) or not having order[s] or injunction[s] 'so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.' Regal Knitwear, 324 U.S. at 13, 89 L.Ed. 661; see Alemite Mfg. Corp. v. Staff, 42 F.2d 83 (CA2 1930). The tie between the offending employer and the bona fide purchaser of the business, sup-

plied by a Board finding a continuing business enterprise, establishes the requisite relationship of dependents . . . ." *Golden State Bottling* v. *N.L.R.B., supra* at 180, 94 S.Ct. 423.

The "guiding Supreme Court interpretations" of *Regal Knitwear and Golden State Bottling* compel a conclusion that the *Stolberg* judgment in no way prohibits the respondents from acting to prevent the plaintiff from simultaneously holding offices in the executive and legislative branches of state government in violation of state constitutional and statutory provisions.

B. The doctrines of *res judicata* and collateral estoppel do not apply even if the respondents-appellees are found to be agents of the defendants or in privity with them.

The gravamen of the plaintiff's case is that the members of the Board of Trustees were required to raise the dual job ban issue (Art. III, Sec. 11, Constitution of Connecticut, Sec. 2-5, Conn. Gen. Stat., as amended) as a defense in the first case, and that not having done so, not only the Board but also every state official is forever precluded from invoking it against the plaintiff under any circumstances so that the judgment constituted some type of collateral estoppel or *res judicata* of the matter against the State of Connecticut. Even if this court decides contrary to the appellees' previously stated position that there does exist an agency or privity relationship between the defendants and the respondents, neither the doctrine of collateral estoppel or *res judicata* affect the instant matter.

Any contention based upon collateral estoppel is readily disposable because that doctrine applies only "where a question of fact essential to the judgment is actually litigated and determined." *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 601-602, 68 S.Ct. 715, 721 (1947); see also *Lawlor* v.

National Screen Service Corp., 349 U.S. 322, 325, 75 S.Ct. 865, 867 (1955); *Tidewater Oil Co.* v. *Jackson*, 320 F.2d 157, 161 (10th Cir.) cert. den. 375 U.S. 942, 84 S.Ct. 347 (1963). The dual job ban issue was obviously never "actually litigated and determined" in the main action. Collateral estoppel provides no foundation for the plaintiff's contempt application.

By the same token, *res judicata* has no application here. "[U]nder the doctrine of res judicata a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based upon the same cause of action." *Lawlor* v. *National Screen Service Corp.*, *supra* at 326, 75 S Ct. at 867.

The state officials point out that the application of the doctrine of *res judicata* is governed by state law. *Forrester* v. *Southern Railway Co.*, 268 F.Supp. 194, 196 (N.D. Ga. 1967). Under Connecticut law the plaintiff could take advantage of the dual job ban issues through this particular doctrine only if the issue was within the scope of the prior proceeding as determined from its pleadings. *Spence* v. *Mack*, 112 Conn. 17, 24, 151 A.309 (1939). The issue must have been one which was essential to the first judgment. *Id;* see also *International Electrical Workers, AFL-CIO* v. *General Electric Co.*, 221 F.Supp. 6, 11 (D. Conn. 1963), aff'd. 332 F.2d 485 (2d Cir. 1964). The determination of the dual job ban was neither part of the main case nor necessary to the judgment which was based upon events occurring in 1969, two years before the plaintiff's first term in the legislature. Having sought and having been granted reinstatement and full benefits retroactive to 1969, it was incumbent upon the plaintiff to place himself to the extent possible in the same employment status he possessed at that time. He could not voluntarily thrust state constitutional and statutory impediments in the way of his own return and expect state officials to ignore them because the plaintiff was being reinstated pursuant to court order; nor could he expect the state officials to raise such state constitutional and statutory

issues when, in fact, the issue could have been rendered moot either by resignation or by failure to run for re-election or even by defeat in that attempt before he actually decided to return to the college. In fact, the plaintiff was re-elected to his third term in 1974 and took office on the day after the hearing on this matter, January 8 1975.

Thus, the state constitutional claim involving the dual job ban was not an essential defense to the prior proceeding. After all, the Court of Appeals sustained the District Court's refusal to adjudicate the plaintiff's due process claim in the main case because "it was entirely proper . . . not to 'anticipate a question of constitutional law in advance of the necessity of deciding it [Citation omitted].'" *Stolberg* v. *Members of the Board of Trustees for the State Colleges*, 474 F.2d 485, 489 (2d Cir. 1973).

In any event, *res judicata* is ultimately inappropriate to this proceeding for the same reason that the plaintiff's case cannot be predicated upon Rule 65(d) — the respondent state officials are not agents, servants, employees of the defendant Board members or in any sort of privity with them.

III.

THE DISTRICT COURT'S CLARIFICATION OF ITS EARLIER JUDGMENT DID NOT UNDERMINE ANY RIGHTS AND OBLIGATIONS ESTABLISHED THEREUNDER.

In its Memorandum of Decision on the motion for contempt judgment, the District Court simply made explicit the obvious — that no decision on the merits of a dual job ban claim had been made. (J.A. 74a). This clarification has not changed or undermined the position of the parties bound by the 1972 judgment. At the trial, the Court indicated to the parties in open court that it did not regard the dual job ban

issue to be in the case. (J.A. 60a). Thus, the plaintiff cannot now legitimately claim to be affected adversely by the clarification since the scope of the 1972 judgment has not been changed.

IV.

THE DISTRICT COURT DID NOT ERR IN NOT FINDING BAD FAITH ON THE PART OF CERTAIN RESPONDENTS-APPELLEES.

The rendering of the formal letter of advice which was occasioned by an unsolicited request from the State Comptroller cannot be deemed an act of contempt. Nowhere does the plaintiff allege that either respondents Killian or Giber solicited the State Comptroller's request for advice of October 15, 1974 and that they did so in order to vitiate the effectiveness of the Court's reinstatement order. The Attorney General's office, through its well-established channels, merely gave the requested advice as required by law. Sec. 3-125, Conn. Gen. Stat., as amended.

The giving of such advice in this instance does not constitute contempt even if it did have an effect on the subject matter of the court order in question. In *T. W. Holt & Co. v. United States,* 41 C.C.P.A. (Customs) 8, two employees of the Treasury Department advised the Collector of Customs not to pay a certain court decree because in their opinion the judgment was not final and because the petitioner was not a proper party to whom the money in question should be paid. *Supra* at 10. In the contempt hearing, the Court disagreed with the government's contention but declined to hold the Treasury officials in contempt. The Court stated:

> "It is not our prerogative in this appeal to say that high officials in the Government advising their superiors as to

> what they consider the law to mean, and that advice resulting in delay in the final settlement of the dispute, should be cited as in contempt of the court awarding the judgment under discussion. It would be just as untenable to also include the Attorney General who advises and argues just as strenuously in support of the employees' reasoning. The United States Customs Court, like all federal courts, has abundant and adequate powers, as it should have, to punish for contempt any and all guilty thereof. That does not mean such a reckless disregard for the rights, as in this instance, of employees of the Government who see a situation and express it differently than a court might have adjudged." *Supra* at 12.

The facts of the instant case are even stronger in support for the respondents because the Attorney General's advice did not purport to construe or challenge the Court's order but arose from an independent source and dealt with an issue not in the original suit. The advice itself was predicated upon a 1971 letter of advice (J.A. 65a-72a) which dispells any innuendo that the letter was conceived and issued for the purpose of defeating the Court's order. By statute the State Comptroller is a "client" of the Attorney General, as is the Board of Trustees, § 3-125, Conn. Gen. Stat., as amended. When he asks the Attorney General for advice on a legal matter he is entitled to a direct and honest opinion; the canons of ethics obviously require it. The Attorney General cannot shirk his responsibility by reversing prior opinions without a legal rationale therefor solely to avoid a contempt proceeding. Thus, in drafting the letter of advice in question which was in essence upon a 1971 letter of advice, respondent Giber was honestly discharging his statutory and professional responsibilities as was respondent Killian in approving same upon the recommendation of three of his subordinates.

V.

THE DISTRICT COURT DID NOT ERR IN DENYING THE PLAINTIFF-APPELLANT'S MOTION FOR IMMEDIATE AND INTERIM SALARY RELIEF.

An application for a preliminary injunction is addressed to the judical discretion of the district court, and this court's action will not be set aside on appeal unless it is erroneous as a matter of law or the result of an improvident exercise of judicial discretion. 7 *Moore's Federal Practice*, ¶ 65.04 [1] at 65-35 (2d Ed. 1974). It is further established that the power to issue an interlocutory injunction which compels the defendant, in order to obey it, to take affirmative action should be sparingly exercised. 7*Moore's Federal Practice*, ¶ 65.04 [1] at 65-38 (2d Ed. 1974).

A clear abuse of discretion, which is not present in this case, must thus be shown before the trial court's denial of temporary injunctive relief is reversed. *Checker Motors Corporation* v. *Chrysler Corporation*, 405 F.2d 319, 323 (2d Cir. 1969).

> "The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." (Citations omitted). *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973).

The plaintiff claims that he has met the second requirement enumerated in *Sonesta* in that the balance of hardships

have tipped decidedly toward him. Plaintiff's Brief, p. 48. Although the plaintiff has taught at S.C.S.C. without pay for quite some time, he has voluntarily put himself in this unfortunate situation.

Assuming *arguendo* the State Comptroller has a ministerial duty to make salary payments to the plaintiff notwithstanding the claimed violation of the dual job ban, the plaintiff could have immediately brought a mandamus action against the State Comptroller, or an action for declaratory judgment, and he surely would have obtained a Superior Court judgment by now.

The plaintiff's affidavit in support of his motion for interim salary relief reflecting his financial condition (J.A. 115a) also suggests that if he should ultimately lose on the dual job ban issue determination then the State, his employer, would be without remedy for its losses, unless he were to post a large bond. See *Hoh* v. *Pepsico Inc.*, 491 F.2d 556, 560 (2d Cir. 1974).

Finally, there is no danger that Stolberg will suffer irreparable injury unless he receives interim salary relief. If Stolberg wins on the merits on the dual job ban issue, the State will issue all the pay which will then be owed to him. In *Sampson* v. *Murray*, 415 U.S. 61, 91-92, 94 S.Ct. 937, 953 (1974), the Supreme Court made the following observation:

> "Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case."

CONCLUSION

For all of the aforesaid reasons defendants and respondents-appellees respectfully request this court to affirm the District Court orders denying the plaintiff's motions for contempt judgment and for interim order re salary payments.

Respectfully submitted,

DEFENDANTS-APPELLEES and
RESPONDENTS-APPELLEES

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

* * *

CONSTITUTION OF THE STATE OF CONNECTICUT, 1965

ARTICLE THIRD OF THE LEGISLATIVE DEPARTMENT

* * *

§ 11. Dual Job Ban

SEC. 11. No member of the general assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government, or in the courts of the political subdivisions of the state, or in the government of any county. No member of congress, no person holding any office under the authority of the United States and no person holding any office in the judicial or executive department of the state government or in the government of any county shall be a member of the general assembly during his continuance in such office.

* * *

CONNECTICUT GENERAL STATUTES

* * *

§ 2 5. Holding of office by members of the general assembly.

No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government, except as provided in this section. The provisions of this section shall not apply where it is expressly provided by law that a member of the general

assembly as such shall be nominated or appointed to any board, commission, council or other agency in the legislative department.

* * *

§ 2-90. (Formerly Sec. 4-63). Duties.

The auditors of public accounts shall organize the work of their office in such manner as they deem most economical and efficient. Said auditors, with the comptroller, shall, at least annually and as much oftener as they deem necessary, audit the public accounts of the treasurer and certify the result to the governor. They shall, at least once a year, make a complete audit of the books and accounts of the comptroller and issue their certificate concerning such audit, which certificate shall be printed in the annual report of the comptroller. They shall audit, annually, and as much oftener as they deem necessary, the accounts of each officer, department, commission, board and court of the state government authorized to expend or contract for expenditure of any state appropriation, and of all institutions supported by the state. They shall audit the accounts, inventories, records and books of each agency of the state receiving and handling state funds. They shall audit the payrolls of all state employees. If the auditors of public accounts discover any unauthorized, illegal, irregular or unsafe handling or expenditure of state funds or if it should come to their knowledge that any unauthorized, illegal, irregular or unsafe handling or expenditure of state funds is contemplated but not consummated, they shall forthwith present the facts to the governor and joint committee on legislative management. Any auditor of public accounts or any of his agents neglecting to make a report of such irregularity as herein provided shall be fined not more than one hundred dollars or imprisoned not more than six months or both. Said

auditors shall make or cause to be made and filed and kept in their office written reports of all audits and examinations made by them or under their direction and supervision. All such reports shall be available for the use of the auditors and of the employees of their department, of the general assembly and of any member or committee or other agency of the general assembly authorized by law to examine and make use of such reports. Each budgeted agency shall keep its records and accounts in such form and by such methods as to exhibit the facts required by said auditors and shall make such records and accounts available to them or their authorized agents, upon demand.

* * *

§ 3-112. Powers and duties.

The word "adjust" as used in this section shall mean to determine the amount equitably due in respect to each item of each claim or demand. The comptroller shall establish and maintain the accounts of the state government and shall perform such other duties as are prescribed by the constitution of the state. He shall register all warrants or orders for the disbursement of the public money. He shall adjust and settle all demands against the state not first adjusted and settled by the general assembly and shall give orders on the treasurer for the balance by him found and allowed. The comptroller shall furnish blank forms necessary to be used in presenting claims or demands for liquidation by him. He shall prescribe the mode of keeping and rendering all public accounts of departments or agencies of the state and of institutions supported by the state or receiving state aid by appropriation from the general assembly. He shall prepare and issue effective accounting and payroll manuals for use by the various agencies of the state. He may require

reports from any department, agency or institution as aforesaid upon any matter of property or finance at any time and under such regulations as he prescribes and shall require special reports upon request of the governor, and the information contained in such special reports shall be transmitted by him to the governor. All records, books and papers in any public office shall at all times be open to inspection by the comptroller. The comptroller shall, from time to time, examine and state the amount of all debts and credits of the state; present all claims in favor of the state against any bankrupt, insolvent debtor or deceased person; and institute and maintain suits, in the name of the state, against all persons who have received money or property belonging to the state and have not accounted for it. All moneys recovered, procured or received for the state by the authority of the comptroller shall be paid to the treasurer, who shall lodge a duplicate receipt therefor with the comptroller.

* * *

§ 3-119. Payment of salaries; statement of officers. Electronic system for personnel data.

The comptroller shall pay all salaries and wages not less than ten days nor more than fifteen days after the close of the payroll period in which the services were rendered, but shall drawn no order in payment for any service of which the payroll officer of the state has official knowledge without the signed statement of the latter that all employees listed on the payroll of each agency have been duly appointed to authorized positions and have rendered the services for which payment is to be made. The comptroller is authorized to develop, install and operate a comprehensive fully documented electronic system for effective personnel data, for payment of compensation to state employees and for maintenance of a chronological

and permanent record of compensation paid to each employee for the state employees retirement system and other purposes. The comptroller is authorized to establish an accounting procedure to implement this section.

* * *

§ 3-125. Duties of attorney general; deputy; assistants.

The attorney general shall appoint a deputy, who shall be sworn to the faithful discharge of his duties and shall perform all the duties of the attorney general in case of his sickness or absence. He shall appoint such other assistants as he deems necessary, subject to the approval of the governor. The attorney general shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the governor, the lieutenant governor, the secretary, the treasurer and the comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters and institutions and for the state librarian in all suits and other civil proceedings, except upon criminal recognizances and ball bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction. When any measure affecting the state treasury is pending before any committee of the general assembly, such committee shall give him reasonable notice of the pendency of such measure, and he shall appear and take such action as he deems to be for the best interests of the state, and he shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. All legal services re-

quired by such officers and boards in matters relating to their officials duties shall be performed by the attorney general or under his direction. All writs, summonses or other processes served upon such officers shall, forthwith, be transmitted by them to the attorney general. All suits or other proceedings by them shall be brought by the attorney general or under his direction. He shall, when required by either branch of the general assembly, give his opinion upon questions of law submitted to him by either of said branches. He shall advise or give his opinion to the head of any executive department or any state board or commission upon any question of law submitted to him. He may procure such assistance as he may require. Whenever a trustee, under the provisions of any charitable trust described in section 45-79, is required by statute to give a bond for the performar e of his duties as trustee, the attorney general may cause a petition to be lodged with the probate court of the district in which such trust property is situated, or where any of the trustees reside, for the fixing, accepting and approving of a bond to the state, conditioned for the proper discharge of the duties of such trust, which bond shall be filed in the office of such probate court. The attorney general shall prepare a topical and chronological cross-index of all legal opinions issued by the office of the attorney general and shall, from time to time, update the same.

* * *

§ 10-109b. Duties of state college trustees.

Said board of trustees shall administer the state colleges, plan for the expansion and development of the institutions within its jurisdiction, and submit such plans to the commission for higher education for approval. The commissioner of public works shall, in accordance with section 4-128, negotiate and execute leases on such physical

facilities as the board may deem necessary for proper operation of such institutions, subject to the approval of the commission, and said board may expend capital funds therefor if such leasing is required during the planning and construction phases of institutions within its jurisdiction for which such capital funds were authorized. The board may appoint or remove the chief executive officer of each institution within its jurisdiction, and with respect to its own operation the board of trustees may appoint and remove an executive secretary and executive staff. The board may determine the size of the executive staff and the duties, terms and conditions of employment of said secretary and staff, subject to the approval of the commission. The board of trustees may employ faculty and other personnel needed to maintain and operate the institutions within its jurisdiction. Within the limitation of appropriations, the board shall fix the compensation of such personnel, establish terms and conditions of employment and prescribe their duties and qualifications. Said board shall determine who constitutes its professional staff and establish compensation and classification schedules for its professional staff. Said board shall annually submit to the personnel policy board a list of the positions which it has included within the professional staff. The board may appoint one or more physicians for the state colleges and shall provide such physicians with suitable facilities for the performance of such duties as it prescribes. After the approval by the commission of any plan of the board for development of a new state college, the board shall select the site for such new college with the advice of, and subject to the approval of, the commission. Within the limits of the bonding authority therefor, the board may acquire such site and construct such buildings as are consistent with the plan of development approved by the commission.

* * *